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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM GIGLIO AND FRANK LIVORSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 2963–2973) is reported at 232 F. 2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1956. (R. 2972.) A petition for rehearing, filed May 4, 1956 (R. 2987), was denied on May 10, 1956 (R. 2997). The petition for a writ of certiorari was filed on June 6, 1956, and was granted on October 15, 1956. (R. 3003.) The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court properly refused to afford petitioners an opportunity to ascertain whether "tainted" evidence had been considered by the grand jury.

2. Whether petitioners were accorded adequate procedural safeguards to prevent the use of any "tainted" evidence at the trial.

3. Whether the evidence was sufficient to support the verdict against Livorsi.

4. Whether, under the circumstances of this case, it was reversible error for the trial judge to limit impeaching cross-examination of one witness to five days and deny a defense counsel request made at that time for "any kind of statements" that the government witness had made "to any of the agents".

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more

than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Section 145.)

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * *

(b) *Fraudulent Returns; Affidavits, and Claims.*—

(1) *Assistance in preparation or presentation.* Any person who willfully aids or assists in, or procures, counsels, or advises the preparation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3793.)

18 U. S. C.:

SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined

not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

This is a companion case to *Lawn v. United States*, No. 9, this Term, which is scheduled to be argued immediately preceding this case. Lawn, and petitioners Giglio and Livorsi, were convicted at a common trial as co-conspirators of evading the payment of over $800,000 in taxes on income taxable during the year 1946 derived largely from black market sugar operations. Over half a million dollars of the unpaid income-tax liability was admitted. A full statement of the facts is given in the Government's brief in *Lawn v. United States* (Gov. Br. No. 9, pp. 4–34), to which the Court is respectfully referred.

In broad outline the Government submitted proof that the petitioners employed three methods to evade tax assessments. One was the fraudulent allocation of income among the many companies and individuals

in the conspiracy of which Giglio and Livorsi were the principals, resulting in a lower tax rate. The second method was the gross overstatement of expenses. A system of false expense accounts was established and amounts of $2,000 or $2,500 withdrawn weekly and charged to them "so that it looks good when an examiner comes down". The third method of evading assessment, less extensively used, was understatement of income. The most important understatement was some $140,000 of cash box profits, reflecting the difference between black-market premiums received for corn syrup and black-market overages paid farmers for the corn.

The core of the conspiracy was the evasion of the *payment* of taxes which were eventually reported as owing. Giglio told his associates that he "was not in this business for the sake of becoming a large taxpayer". Tax liability was concealed from the Government for as long a time as possible by filing false declarations of estimated income and by not filing final returns until they were long overdue. During the period prior to September 1947 when the returns were filed large amounts were withdrawn from the corporations by Giglio and Livorsi and disappeared from

sight. Both of their expensive homes were sold and converted into currency of small denominations. The corporations were put through receivership. Against an admitted tax liability of over $570,000 only $17,000 had been paid at the time of trial.

The relevant procedural facts may be summarized as follows. Indictments returned against the petitioners in 1952 for basically the same offenses as here involved were dismissed on the ground that petitioners had been ordered by subpoena to produce partnership records before the grand jury, in violation of their rights against self-incrimination. *United States* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y.), appeal dismissed as untimely *sub nom.* *United States* v. *Roth*, 208 F. 2d 467 (C. A. 2). A new and slightly different indictment against petitioners was returned by a grand jury in 1953. (R. 10–21.) Petitioners had not been called before this grand jury and there was no indication that any of the documents or evidence obtained by the first grand jury had been available to it. Petitioners moved to dismiss the indictment (R. 26) on the theory that its similarity to the 1952 indictments made it too suspect to stand. Lengthy affidavits were filed on both sides (R. 28–112) and full argument

heard on the point (R. 113–178). In denying the motion Judge Palmieri found that even if an evidentiary hearing on such a question might ever be held, there was not an adequate ground here (R. 182–183):

> From the affidavits presented by the defendants and the Government it is clear that defendants' claim does not have the "solidity" required to justify holding a hearing. * * * I find no basis for exercising my discretion to grant a hearing or inspection of the grand jury minutes. * * *

Further affidavits were filed (R. 188–226); a defendants' motion to reargue the motion to dismiss the indictment was denied. (R. 229–232.) The motion to dismiss the indictment was renewed prior to trial (R. 244), argued, and denied (R. 247–248). At the trial petitioners were accorded the opportunity to cross-examine as to the source of evidence used at the trial, but were not allowed to cross-examine for the purpose of discovering what evidence was before the grand jury.

Petitioners were represented by experienced trial counsel—Mr. Lloyd Paul Stryker. The jury trial lasted six weeks, at the end of which petitioners were

found guilty as charged. (R. 2735.) Giglio was sentenced to five years on each of eight counts, some consecutive, some concurrent, for a total of fifteen years. Livorsi was sentenced to five years on each of the four counts (one to run concurrently) for a total of fifteen years. (R. 2739–2741.) In an opinion by Chief Judge Clark, the Court of Appeals unanimously affirmed. (R. 2963–2972.)

SUMMARY OF ARGUMENT

I

The trial court properly refused to allow petitioners an opportunity to seek to establish that "tainted" evidence or evidence derived therefrom had been presented to the grand jury which returned this indictment.

A. The indictment, valid on its face, of a properly constituted grand jury is not subject to dismissal on the basis of the evidence which it considered. The protection which the grand jury accords is basically the conscience of each of its members, not rigid rules as to what it may or may not consider. The rules of evidence do not apply to a grand jury. Indictments which may have been based upon an incompetent confession or solely on hearsay are nonetheless valid. *Holt* v. *United States*, 218 U. S. 245; *Costello* v. *United States*, 350 U. S. 359. There is no procedural right to a hearing to find out what the grand jury considered. There is no reason to have a preliminary judicial proceeding in order to decide whether there should be a judicial proceeding.

B. Even if it were true that in exceptional circumstances an indictment could be dismissed on the basis of the evidence which the grand jury considered, the foundation for any such claim was not laid here. There was a great amount of admittedly untainted evidence upon which the grand jury might have acted. Both courts below found that the suggestion that the 1953 grand jury might have considered improper evidence did not have the solidity to justify examination into the grand jury minutes.

II

A. Petitioners were given every opportunity they desired to cross-examine as to the sources of evidence introduced against them at the trial. A detailed examination of the record shows that petitioners claim that they were denied the opportunity to establish that the Government's case was based on tainted evidence is unfounded. In each instance where petitioners were turned down, their efforts were directed not at the evidence before the trial but at seeking a dismissal of the indictment.

B. Whether or not any restrictions were imposed upon petitioners with respect to the sources of evidence used at the trial, petitioners were accorded procedural safeguards far beyond those required under *Nardone* v. *United States*, 308 U. S. 338. Assuming that under the circumstances here petitioners were entitled to an "opportunity, however closely confined," to prove that a substantial portion of the case against them was "fruit of the poisonous tree," that test is more than met. Petitioners were provided with all of

the "tainted" documents themselves; the full transcript of their "tainted" testimony before the 1952 grand jury, and the occasion to cross-examine. The trial judge kept a keen eye on the question of the source of each bit of evidence, evidence was regularly identified as to source, and defense counsel was requested to suggest in writing any evidence that might conceivably have been derived from "tainted" sources—a request with which defense counsel did not comply.

III

No question is raised regarding the sufficiency of the evidence to support the conviction of petitioner Giglio. We believe the evidence is also sufficient to support the conviction of Livorsi on the four counts of which he was convicted, on three of which the sentences are consecutive. His filing of a false individual income tax return for 1946 (Count 6) was proved by evidence that his distributive share of Tavern partnership income was understated by $40,436.22 and that he had failed to report $20,780.33 realized from the sale of corn syrup after Lubben severed his connection with the Eatsum partnership. The trial court's instruction to the jury in regard to the Eatsum income clearly meant that the jury should disregard the alleged understatement of Livorsi's income from the Eatsum partnership. It did not require the jury to ignore the other understatements alleged, nor to consider that Livorsi had overstated his Eatsum income, which could be credited against the other understatements.

Count 9, charging that Livorsi and others had wilfully attempted to evade the *payment* of the corpo-

rate income taxes for 1946 by misappropriating, converting and diverting the corporate assets to their own use, was supported by proof that Livorsi and Giglio had systematically withdrawn hundreds of thousands of dollars from the corporations during 1946 and 1947. The evidence showed that Livorsi received half of the proceeds of these defalcations, without which the corporations would have been able to pay the $104,701.35 income tax liability reported on the return. Only $300 was ever paid on this obligation.

Livorsi was proved to be a party to the conspiracy alleged in Count 10. After Lubben's departure early in 1946, Livorsi owned half of all of the enterprises named in the indictment, except American Agar Corporation, in which he had a 37½% interest. As 50% owner, Livorsi received 50% of the huge amounts syphoned off from the companies by himself and Giglio in 1946 and 1947, the effect of which was to render the corporations unable to pay their taxes. As for the individual income tax returns, Livorsi, like Giglio, filed his return six months late and paid only about $8,000 on a reported tax liability of $236,003.65. On almost the very day these returns were filed Livorsi, like Giglio, sold his estate. Livorsi received a check for the net proceeds in the amount of $64,335.49 which he cashed at the bank, pocketed the currency (the bulk of it in $100 bills), and departed.

IV

In the light of the decision in *Jencks* v. *United States*, 353 U. S. 657, petitioners Giglio and Livorsi ask this Court to reverse their conviction because de-

fense counsel's broad request for prior statements and other documents relating to one witness was turned down.

A. The question was not raised on appeal in the court below or in the petition for certiorari. The record indicates a conscious abandonment of the point. It was not among the numerous alleged grounds for a new trial nor was it raised in the Court of Appeals, although the Second Circuit had the most well-established and liberal rule of any circuit as to inspection of prior statements of government witnesses.

B. Defense counsel's request included witness Lubben's income tax returns for the purpose of seeking to show that they were not correct—clearly an improper basis of impeachment, aside from the privilege and statutory protection given such returns. The grand jury minutes requested are also documents to which petitioners are not entitled. Defense counsel's demand for "any kind of statements that he made to any of the agents" was not the request for "specific documents" that is "essential" under the *Jencks* decision. It was not incumbent upon the court to draft a specific request that might have been granted.

C. Under the circumstances there was no plain error, and certainly no such prejudice as to justify reversal on this issue not raised in the petition for certiorari. Lubben was an important witness but there were twenty other government witnesses who testified at the six weeks' trial. Lubben was ill and afraid for his life. For five days he was kept under strenuous cross-examination directed solely at his credibility in an apparent effort to "break" the wit-

ness. Lubben admitted lying, committing perjury, and engaging in black-market activities. He was confronted with prior statements before the Kefauver Committee and from three trials at which he had been a witness. Impeachment through cross-examination had been carried about as far as it could go when defense counsel demanded copies of all statements which Lubben had made at any time to any government agent, for the purpose of continuing the cross-examination. The judge's denial was based at least as much on his discretionary power to limit excessive cross-examination as on any concern for the documents. If defense counsel had had the documents in his hands it would not have been error—certainly not error requiring reversal at this stage—for the judge to have called a halt to the cross-examination. The *Jencks* decision does not turn the conduct of a trial over to defense counsel.

ARGUMENT

I

THE DISTRICT COURT PROPERLY REFUSED TO AFFORD PETITIONERS AN OPPORTUNITY TO ASCERTAIN WHETHER TAINTED EVIDENCE HAD BEEN EMPLOYED IN PROCURING THE INDICTMENT

It is important at the outset to distinguish two entirely different issues which petitioners confuse: (I) the sources of the evidence submitted to the grand jury which returned the indictment, and (II) the sources of the Government's evidence introduced at the trial. We deal below, as Point II of this brief,

infra, pp. 19–35, with the issue of protecting the defendants from the use of illegally obtained evidence at the trial. We believe they had full opportunity to determine the sources of the evidence introduced against them. We consider here, as Point I, petitioners' contention that they had the right to the grand jury minutes and an evidentiary hearing for the purpose of attacking the indictment.

In seeking a hearing with respect to the sources of evidence submitted to the grand jury, petitioners relied on Judge Goddard's decision which dismissed the 1952 indictments on the ground that petitioners' privilege against self-incrimination had been violated in the course of the 1952 grand jury progeedings. Pointing out the similarity of the present (1953) indictment with the 1952 indictments, petitioners urged that Judge Goddard's decision was sufficient, under the doctrine of *Nardone* v. *United States*, 308 U. S. 338, to entitle them to a full opportunity to determine whether or not the government had employed any of the tainted evidence, or leads and clues obtained therefrom, in obtaining the present indictment.

The answer to this contention is twofold: (*a*) the *Nardone* doctrine is inapplicable to the evidence used in grand jury proceedings (as distinguished from evidence used at a trial); and (*b*) in this case, in any event, the preliminary showing required by *Nardone* was not made. For purposes of this discussion, it will be assumed that the rule of the *Nardone* case, which involved evidence obtained by illegal wiretapping, also applies to evidence obtained in violation

of the privilege against self-incrimination. We will also assume that Judge Goddard's decision, insofar as it involved certain issues relating to the 1952 grand jury proceedings, is binding here, even though the Government has never acquiesced in it and even though its very foundation seems in substantial doubt.[1]

A. AN INDICTMENT, VALID ON ITS FACE, OF A PROPERLY CONSTITUTED GRAND JURY IS NOT SUBJECT TO ATTACK ON THE BASIS OF THE EVIDENCE CONSIDERED

Through the inspection of the minutes of the second grand jury and a full dress evidentiary hearing, petitioners sought to establish the invalidity of the 1953 indictment. Petitioners are wrong, however, both as to the substantive law and as to the procedures available to them for an attack on the indictment. The *Nardone* rule, neither in its terms nor in the policy underlying it, applies to the evidence presented in grand jury proceedings; it relates to the evidence upon which a defendant may be convicted.

The difference between an indictment and a conviction, between the function of the grand jury and that of the petit jury, is fundamental. Basically, the pro-

[1] We assume that we are bound by the conclusion that some of the evidence before the 1952 grand jury was obtained in violation of the privilege against self-incrimination and bound by the dismissal of the indictments. We do not, of course, accept the rule of law underlying Judge Goddard's decision that a district court should examine into the evidence upon which a grand jury acted and should dismiss the indictment if improper evidence was before the grand jury. See also Gov. Br. No. 9, pp. 43, 45.

tection afforded an accused man by the grand jury is that he will not have to stand trial unless an unbiased group of citizens believe that there are adequate grounds. The protection we are all afforded against unjust accusations and harassing trials is, in essence, the conscience of each member of the grand jury. It does not lie in formal requirements as to the evidence upon which they act. There is no confrontation, no cross-examination, no adversary frame-work to screen the evidence which may be considered. That an accused's protection stems not from limits on what a grand jury may consider is demonstrated by the lack of rules of evidence and the lack of a presiding judge to apply them.

As a substantive matter, grand juries may consider such evidence as an incompetent confession, *Holt* v. *United States*, 218 U. S. 245, or may base their indictment solely on hearsay, *Costello* v. *United States*, 350 U. S. 359. In the *Holt* case, Mr. Justice Holmes, speaking for a unanimous Court, said: "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground." 218 U. S. at 248. He was referring to the alleged use of evidence that would be incompetent at a jury trial. In assuming that the indictment here would have to be dismissed if petitioners could establish that it considered some evidence that was improperly obtained from them, petitioners are mistaken as to the law:

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the

> merits. The Fifth Amendment requires nothing more. [*Costello* v. *United States,* 350 U. S. 359, 363]

We need not consider here extreme hypothetical cases where the courts might step in to dismiss an indictment. Any such action should not be based on the circumstance that the grand jury considered *some* evidence which was improper but, possibly, only where there was patently no basis whatsoever for holding the defendant for trial or where there had been a manifest denial of due process. This is hardly such a case.

Petitioners do not doubt that there was available for submission to the grand jury a vast amount of evidence obtained by governmental investigation prior to the 1952 grand jury and wholly "untainted" in any way. And the "taint" which Judge Goddard found must be viewed in context. It stemmed from the failure of the grand jury record to show that Roth, Livorsi, Lawn and Giglio had been advised of their constitutional rights. Roth and Livorsi produced no documents. (R. 2867.) Lawn, former Chief of the Criminal Division of the United States Attorney's office for New Jersey, was hardly unaware of his rights. Giglio was also in fact aware of his constitutional rights since he repeatedly claimed them before the grand jury. (R. 2868.) And, as we read the transcript, the judicial compulsion brought to bear on Giglio after his claim of constitutional rights was directed at the corporate records with respect to which he had no privilege. (See R. 2821–2823, 2847, 2851–2854.)

Petitioners are also mistaken as to the procedural rights they claim in order to attack the indictment. They seek the grand jury minutes and a full evidentiary hearing as to what occurred before the grand jury and the source of all the evidence there presented. We know of no such right to "go fishing" into the proceedings of the grand jury, and there is no reason for such a rule to be adopted. Criminal proceedings which are already lengthy would be further protracted. This Court recently considered the consequences of such a possible procedure in the *Costello* case, 350 U. S. at 363–364:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. * * *
>
> * * * Defendants are not entitled, however, to a rule which would result in interminable delay but adds nothing to the assurance of a fair trial.

B. EVEN IF UNDER SOME EXCEPTIONAL CIRCUMSTANCES A DEFENDANT SHOULD BE ALLOWED TO EXPLORE THE EVIDENCE BEFORE A GRAND JURY, THERE WERE NO SUCH CIRCUMSTANCES HERE

Petitioners contend that the theory of the *Nardone* decision should be applied to the grand jury and that they should be allowed to prove that the 1953 indict-

ment was fruit of the "poisonous" 1952 procedure. But even under the *Nardone* rule (308 U. S. at 342):

> * * * claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. * * *

Both courts below held that petitioners' claims did not satisfy this requirement. The findings of the two courts below on this essentially factual issue should be sustained.

Petitioners' attack on the indictment was based on two things: Judge Goddard's dismissal of the 1952 indictment, and the similarity between the 1953 indictment and the one that had been dismissed. But as stated in *United States* v. *Pillon*, 36 F. Supp. 567, 568 (E. D. N. Y.):

> * * * having suffered the dismissal of the earlier indictments for the reason stated, it is manifestly improbable that the Government would do such an idle thing as to again rely upon evidence which the * * * Court has condemned in plain and unmistakable terms.

In answer to petitioners' motion to dismiss the indictment, the Government filed what the district court regarded as "affidavits of considerable weight." (R. 181; 16 F. R. D. at 270.) These affidavits were received "from all the revenue agents who have been responsible for the investigation leading to the indictment of the defendants and from all the United States Attorneys who have been responsible for the prosecu-

tion of this case." Judge Palmieri summarized the affidavits as follows (R. 182):

> These affidavits show that the activities of the defendants have been under investigation since 1948 and that three revenue agents spent a substantial period of time on this investigation before defendants appeared before the grand jury that returned the prior indictments in 1952. The affidavits show that long before 1952 the Government had in its possession copies of bank checks, bank statements, books and other records pertaining to the defendants' activities which had been secured from banks, third persons, a New Jersey Equity receiver, government agencies, and material abandoned by the defendants; * * *. The affiants also state that the revenue agent referred to this material as the basis for his computations, that the illegally obtained material was largely irrelevant, deliberately shuffled and contained no new evidence or leads thereto. The Government affiants admit that the tainted material contained corroboration of evidence that the Government had previously acquired but state that this corroborative evidence was in no way used in obtaining the present indictment.

On the basis of these affidavits and the affidavits presented by the defendants, Judge Palmieri concluded (*ibid.*) that the "defendants' claim does not have the 'solidity' required to justify holding a hearing," that (R. 183) "I find no basis for exercising my discretion to grant a hearing or inspection of grand jury minutes," and that there was "no room for an inference that the Government used illegally obtained material in

securing the present indictment * * *." Judge Walsh reached the same conclusion. (R. 2085–2086.)

In affirming, the court below found no abuse of discretion in Judge Palmieri's ruling. As it pointed out, "The mere fact that Judge Goddard dismissed the 1952 indictment because of the use of allegedly illegal evidence did not create a requirement as a matter of law for cross-examination of government witnesses and examination of Government documents and grand jury minutes; and particularly is this so in the face of the strong adverse showing made by the affidavits of the prosecution." (R. 2969–2970.) The court was also impressed with the "massive evidence" obtained by the Government prior to the 1952 grand jury proceedings.

Considering the circumstances of this case, even assuming *arguendo* that the *Nardone* rule is applicable to evidence presented to the grand jury, we do not think further review is required of the affirmance by the court below of the trial court's exercise of discretion in denying the requested hearing. Cf. *Carrado* v. *United States* 210 F. 2d 712, 717–718 (C. A. D. C.), certiorari denied, 347 U. S. 1018.

II

PETITIONERS WERE GIVEN EVERY PROTECTION TO ENSURE THAT NO "TAINTED" EVIDENCE WAS USED AGAINST THEM AT THE TRIAL

We now turn to petitioners' contention that they were convicted without due process of law in that they were not given a fair opportunity to establish

that evidence introduced *at the trial* was obtained in violation of their constitutional rights or based on evidence that was so obtained. This contention is made by petitioner Lawn in No. 9, this Term, (Lawn Br. 44–48) as well as by petitioners Giglio and Livorsi (Br. 22–37). We deal with the argument of all three petitioners in this brief. (See Gov. Br. No. 9, pp. 59–61.)

As stated above (*supra*, pp. 12–13), we will assume—as argued by petitioners—that the rule as to evidence obtained by illegal wire-tapping set down by the Court in *Nardone* v. *United States*, 308 U. S. 338, is applicable to evidence obtained in violation of the privilege against self-incrimination. We will also accept, for the purposes of this argument, that Judge Goddard's decision dismissing the 1952 indictments, *United States* v. *Lawn*, 115 F. Supp. 674, established that some evidence before that grand jury had been obtained in violation of the Fifth Amendment. *Supra*, p. 13. And, although pointing out above, *supra*, pp. 16–19, that the claim of taint as to the second grand jury was in any event too weak to justify a full scale hearing as to the validity of the indictment, we will further assume, with petitioners, that Judge Goddard's decision was enough to bring the *Nardone* rule into operation as far as evidence introduced at the trial was concerned. Our answer to petitioners' argument is twofold: first, that petitioners were in fact accorded every opportunity they sought to determine the sources of evidence used *at the trial*, and second, that they were given procedural safeguards in this

respect far beyond the "closely confined" opportunity required by the *Nardone* rule.

A. PETITIONERS WERE ACCORDED EVERY OPPORTUNITY THEY SOUGHT TO DETERMINE WHETHER "TAINTED" EVIDENCE WAS BEING USED AGAINST THEM

Contrary to the present contention of petitioners (Br. 31–37, Lawn Br. 44–48), petitioners were not prevented from examining when their purpose was to ascertain the source of evidence offered at the trial, as distinguished from that used before the grand jury. The record references advanced by petitioners in support of the argument that they were so prevented do not support that contention. Those references, which we shall discuss *seriatim*, are as follows (Br. 15; Lawn Br. 44):

(*a*) *R. 1315–1322.*—After defense counsel indicated that the purpose of his questions was to interrogate Roth "about anything that bears on his credibility" (R. 1316), there was a conference at the bench, after which it became clear that he had the additional purpose of attempting to show that "tainted" evidence had been used in obtaining the indictment (R. 1319–1322).

(*b*) *R. 1344–1347.*—Here it is explicit that defense counsel's purpose was to attack the validity of the indictment (R. 1347):

> The COURT. * * * Now, the whole purpose of this is to go to the procedural validity of the indictment.
>
> Mr. STRYKER. That is it, yes, sir. That is it, that is just it exactly.

> The COURT. And it is a question, really, of what happened before the grand jury.
>
> Mr. STRYKER. That's it, really, just that.

(*c*) *R. 1353–1356.*—This is a continuation of the colloquy which began at R. 1344 quoted in (*b*) above, relating to the validity of the indictment. Although Government counsel said that he had no objection to questioning devoted to the admissibility of evidence at the trial (R. 1353), it appears that defense counsel had indicated no change in what he was talking about, namely, the validity of the indictment.

As to the meaning of the colloquy there can be little doubt when read in context. Cross-examination of Roth had been stopped where its purpose was, in lieu of a hearing, "to determine whether or not any illegal evidence had been used before the grand jury that found this indictment". (R. 1319.) Cross-examination had been allowed where its apparent purpose was to relate evidence at the trial to evidence obtained before the 1952 grand jury. *E. g.*, R. 1323:

> Did you produce [before the 1952 grand jury] the papers that you were asked about here in this court that you said you found in some envelope, as I recall it?

(*d*) *R. 1943–1945.*—This colloquy followed a clearly objectionable question put to Treasury Agent Present on cross-examination,[2] and here, again, it is clear that

[2] After questioning the agent at length as to the nature of the books and records he had used in his audit prior to the issuance of the 1952 grand jury subpoenas to petitioners (R. 1929–1942), defense counsel asked the agent to name "any other books or records which you examined in your audit, which I have failed to ask you about, or which have not been mentioned by you this

counsel's purpose was to attack the indictment (R. 1944):

> Mr. STRYKER. Let me get this straight: Mr. Wessel is right that there are affidavits before Judge Palmieri to the effect that no leads and clues, obtained from the illegally seized papers, were used by the grand jury that found this indictment. Now, if any witness is in error about that, since I have not been permitted to examine into this by motion, which I had supposed was the proper way, I have no other way, no other recourse, through no fault of mine, than to do it here.

(*e*) *R. 1958.*—The trial judge here indicated that *he* was concerned that nothing should come before the jury which could be attributed to improperly secured records. However, the "hearing" for which the judge wanted a better foundation was the one in which defense counsel expressed an interest (R. 1958):

> The COURT. —you were talking about the evidence that had come before the grand jury.
> Mr. STRYKER. That's right.

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afternoon" (R. 1942). The answer to this question (relating, as it did, to the Treasury Agent's *audit*, rather than evidence introduced at the trial) would have involved a discussion of the partnership records turned over to the 1952 grand jury by Giglio. The prosecutor stated (R. 1944):

> * * * A part of the dismissed indictment was based on those records, and that part was deleted from the new indictment. If counsel elicits testimony now about those facts, there is going to be before this court evidence which Judge Goddard held improper. Now, even if counsel brings that out voluntarily, it might be error. If counsel wishes to examine into this field I think he should do it outside the presence of the jury, because it might be prejudicial error even if he voluntarily does it.

> The Court. I think you wanted a hearing as a possible basis for dismissing the indictment.

That defense counsel was not concerned over the sources of evidence at the trial is further apparent from the fact that five pages later, in response to the judge's renewed request for a memorandum on the point, defense counsel stated (R. 1963): "I was trying to avoid a little work." and "Your Honor can well imagine that I am pretty busy night and day." (No memorandum was filed; see *infra*, p. 32.)

(*f*) *R. 2076–2088.*—This lengthy discussion related to the defense motion to dismiss the indictment made at the close of the Government's case. True, at one point in this colloquy defense counsel claimed that he had not been permitted to inquire as to whether any evidence introduced at the trial had been improperly obtained (R. 2077), but the record does not support that assertion. Occasional ambiguity in the language does not conceal the fact that defense counsel was again attacking the indictment. He referred to the "deadly parallel" between the 1952 and the 1953 indictments (R. 2086), his interest in cross-examining those who had made the affidavits before Judge Palmieri (about the 1953 indictment) (R. 2086), and the fact that the court would not let him call witnesses "and interrogate them with respect to that matter, which definitely isn't an issue in this trial" (R. 2087). The reference could hardly be to the issue of admissibility of evidence at the trial. The conclusion of the colloquy was the statement by defense counsel that he

understood that the court denied his motion to dismiss the indictment. (R. 2087–2088.)

"(*g*) *R. 2116, 2136–2137.*—The defense called as a witness Jerome Leone, the former Assistant United States Attorney who had caused the issuance of the *subpoenas duces tecum* to petitioners in connection with the 1952 grand jury proceedings. The court expressed the "tentative view" that "the mere interrogation as to the 1952 proceedings is as yet too remote from the issues of this case" (R. 2116) and defense counsel stated that he regarded himself "as barred by your Honor's ruling as to what the evidence was before the grand jury that found this indictment * * *" (R. 2117). Later, when defense counsel began to question Leone about the issuance of the subpoenas in 1952 (R. 2133), counsel stated that his purpose was merely to show the jury that the prosecution was guilty of "bad faith" (R. 2134). Counsel had announced in his opening statement, while referring at length to the 1952 grand jury proceedings (R. 2904–2908), that "it is a fundamental part of my defense that this whole lawsuit, this action, is founded in bad faith" (R. 2905). Now, with Leone on the witness stand, counsel unsuccessfully sought to justify questions relating to the 1952 grand jury proceedings as follows (R. 2134–2137):

> I have opened to this jury telling the history of this case and I don't want to be told later on that I haven't done my best to substantiate what I have told them. * * *
>
> * * * * *

> I have said to this jury, in the opening, that this case was founded in bad faith, bad faith.
>
> * * * * *
>
> Well, I don't want it to be said that I made a statement about the history of this case, which I made in all good faith, and I believe a very accurate one, without the opportunity to substantiate what I said.
>
> * * * * *
>
> As to the correctness of Judge Goddard's ruling or anything else, that certainly isn't before the jury, but what the Government did, what the prosecutors did in violating the rights of these defendants, as bearing on the whole nature of this prosecution, I submit has the highest relevancy.

It should be noted that even if counsel had urged that the purpose of his questions to Leone was to ascertain whether any trial evidence might have been "tainted", which counsel did not do, the inquiry would in all likelihood have been futile. Leone resigned from Government service in 1953 (R. 102) and the trial did not begin until January 1955 (R. 236).

We submit that there is no support in the record for petitioners' contention that they were prevented from inquiring for the purpose of ascertaining whether any of the Government's evidence offered at the trial might have been "tainted".

B. PETITIONERS WERE ACCORDED PROCEDURAL SAFEGUARDS AGAINST THE USE OF "TAINTED" EVIDENCE FAR BEYOND THOSE REQUIRED UNDER THE *NARDONE* RULE.

The holding in *Nardone* v. *United States*, 308 U. S. 338, was that the Government could not obtain a con-

viction based on evidence which, though not illegally obtained itself, was derived from illegal wire-taps. In dealing with the procedural problem, which this substantive holding might create, the Court said (308 U. S. at 341, emphasis added):

> A sensible way of dealing with such a situation * * * ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, *however closely confined*, to the accused to prove that a *substantial portion* of the case against him was a fruit of the poisonous tree.

It is this procedure to which we refer as the *Nardone* rule.

As stated above, *supra*, pp. 21–26, we believe petitioners were accorded every opportunity they sought in order to prove that any item in the case against them was based upon "tainted" evidence. Certainly as to the rulings of which they complain, the district judge understood they were seeking to challenge the evidence before the grand jury. If petitioners' trial counsel thought otherwise, he had ample opportunity to clarify any ambiguity. But even should some colloquy be construed as a denial of a defense motion for further questioning as to the source of evidence at the trial, petitioners were accorded full due process. The *Nardone* rule does not turn the conduct of the trial over to defense counsel. When one reviews the pro-

cedure followed here to ensure petitioners that the case against them was not based on "tainted" evidence, the claim of "lack of due process" is found to be hollow.

The safeguards accorded petitioners included (1) a painstaking and conscientious effort on the part of the prosecution to use untainted evidence exclusively, (2) the return to petitioners, pursuant to court order and prior to trial, of the documents alleged to have been illegally obtained from them, (3) providing petitioners with the text of the 1952 grand jury minutes, (4) alerting the trial judge to the problem at the outset of the trial and recognition by him of his responsibility to see that no "tainted" evidence crept into the record, (5) the use of evidence, the source of which was either obvious from the testimony or face of a document or was brought out on direct or cross-examination, (6) affording petitioners every opportunity to examine when their purpose was to ascertain the source of trial evidence, and (7) allowing petitioners not only to object to the introduction of any evidence on the ground it was tainted but also, after the Government's evidence was in, to show the trial judge any evidence which even suggested the use of illegal clues.

1. In answer to the petitioners' pre-trial motion to dismiss the indictment, affidavits were submitted by all those persons responsible for presentation of the Government's case. These affidavits showed that prior to the submission of this case to the 1953 grand jury (1) all "tainted" evidence was carefully ex-

cluded from the evidence to be used, any doubt being resolved in favor of exclusion, and (2) the agents were instructed not to use either before the grand jury or at the trial any evidence which was obtained in any way from evidence alleged to have been illegally obtained. (R. 82, 88–89, 92, 98, 101, 103–104, 106–107, 109.)

2. On October 21, 1954, almost three months prior to the commencement of the trial on January 11, 1955, Judge Palmieri ordered returned to petitioners the documents alleged to have been illegally obtained from them. (R. 184.) These documents, as well as unquestioned documents in the Government's possession, had been previously examined on behalf of the petitioners (R. 84, 90–91, 95, 98), and petitioners were allowed to inspect and make copies of the unquestioned documents prior to trial (R. 231–232). Indeed, petitioners had rejected the Government's offer to have the documents alleged to have been illegally obtained from them returned in March of 1954. (R. 216–217.) Accordingly, petitioners cannot assert that lack of such documents themselves prevented them from being in a position to challenge the use of any "tainted" evidence at the trial.

3. Throughout the pre-trial proceedings and the six-weeks trial, petitioners had before them the printed text of their 1952 testimony before the grand jury. (R. 2788–2864.)[1] This, together with the documents

[1] They had been released for the proceedings before Judge Goddard and had been printed as an appendix to the Government's brief in the Court of Appeals on the appeal, *United States* v. *Roth*, 208 F. 2d 467.

which had been returned, constituted the total "tainted" evidence on which they feared trial evidence might be based. They were thus in the best position in which it was possible to place them for determining whether any of the evidence at the trial appeared to be derived from "tainted" evidence. There was nothing more to give them that was relevant to the issue of tainted evidence at the trial. (The 1953 grand jury minutes had no bearing on the issue of the use of tainted evidence at the trial.)

4. The trial judge was on guard against the use of any "tainted" evidence at the trial. Prior to the picking of the jury, the problem was called to Judge Walsh's attention by defense counsel, specifically mentioning the question of leads and clues. (R. 245.) The court recognized that this related to their use at the trial (R. 246), and later stated that he had the point sharply in mind "as each thread of evidence" went in (R. 2745). The judge deliberately undertook it as his responsibility to police the evidence that was introduced (R. 1958):

> The COURT. * * *
>
> Now, it seems to me that here I have the additional question of making sure there is nothing that has come before this jury, this trial jury, which could be attributed to improperly secured records.
>
> Am I correct on that?
>
> Mr. WESSEL. Yes, your Honor.
>
> The COURT. That is what I want to be sure of.

5. The source of almost all the Government's documentary evidence was either apparent on its face or

developed after direct and cross-examination. Direct and cross-examination with regard to the source of the Government's testimonial and documentary evidence was conducted wherever the source was not clear from the testimony or face of a document or known to petitioners:

Lubben records: R. 346, 379–81, 412 (direct)
Roth records: R. 1153 (direct)
National Sugar records: R. 1628–34 (cross)
Nitnoline records: R. 1657–8 (cross)
Stein-Hall records: R. 1662 (cross)
Bereu records: R. 1719–20 (direct) 1732–3, 1738–40, 1751–2, 1758 (cross)
Hexter records: R. 1832 (cross)
Cross-examination of Government Agent and expert on sources of evidence generally: R. 1928–45, 2030–2, 2044–6, 2048.
Weinert testimony: R. 1744–5

6. As we pointed out above, *supra*, pp. 21–26, petitioners were never denied the opportunity to cross-examine where the purpose was to establish the source of evidence introduced at the trial. That this right was used is apparent from the record. Some of the references are given in the preceding paragraph. Such cross-examination, by itself, would appear to have provided defendants with the opportunity to attack the Government's trial evidence required under the *Nardone* rule.

7. Near the end of the Government's case, the court requested both sides to submit memoranda on the sub-

ject of any evidence that *could have been developed* from the records acquired by the 1952 grand jury which might form the basis for a hearing outside the presence of the jury on that subject (R. 1957–1958):

> The COURT. On this question that was raised at the bench, Mr. Stryker, I think the proper thing for me to do is to get briefs from both of you on what foundation you think there is.
>
> We have a three-volume record now, and I have ruled on this on my recollection of it. I don't recall anything that could have been developed from improper records that has come before the jury yet, but I may be wrong on that, and I am just foolish not to take advantage of the better background that you both have, and I would like to have a memorandum on that from you, which will tell me what, if anything, you think the foundation is for a hearing.

Defense counsel suggested that the matter might be dealt with orally (R. 1959), but the court stated that it would rather have a memorandum (R. 1962–1963). Some time later Judge Walsh renewed his request (R. 2076):

> The COURT. I know your general view, Mr. Stryker, but I want to know what is there in this case that you say was improperly obtained from the defendants, what exhibit, what testimony.

Petitioners failed to submit the requested memorandum.[4]

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[4] One can surmise that the reason no memorandum was submitted was that defense counsel was unable to find in the record any item of evidence which "could have been developed"

The adequacy of the safeguards established before and at the trial to prevent the use of any "tainted" evidence at the trial is quite apparent. Although at the time of trial petitioners had had in their possession for some time all documents alleged to have been illegally obtained from them, they found no basis for,

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from improper records. Two and a half years later, with all the "tainted" documents and testimony in one hand and the full record of the trial in the other, petitioners' only suggestion in this regard is that the Government might have first learned of the sale of Giglio's house from his testimony before the 1952 grand jury. (Br. 30.) During questioning of Giglio as to the location of corporate books in 1952 the following colloquy occurred (R. 2830):

"Q. When were these records removed from 19 Rector Street, Mr. Giglio?

"A. I honestly couldn't tell you.

"Q. Were they removed at your direction?

"A. Probably.

"Q. Well, isn't it a fact that they were removed at your direction?

"A. Very probably I ordered them removed, yes. Indeed, there is one more place that you might find some records. *I owned, at one time, a home down in Shrewsbury, New Jersey, in Locust, New Jersey*, and in a barn there I had some filing cabinets, and so forth. There might be some around there yet.

"Q. Well, you sold those premises, did you not?

"A. Yes, I know; but I sold it to a man who permitted me to keep some space there for storage." (Emphasis added)

We submit it as obvious that the Government already knew of the sale of the house. Further, it appears that the information was volunteered, not extracted from petitioner. Any inference of use of "tainted" information would be countered by the Government affidavits. And finally, under any theory, this would hardly be proof that "a substantial portion of the case" was tainted. *Nardone* v. *United States*, 308 U. S. 338, 341.

and did not make, any objection to the introduction of any evidence on the ground that it was "tainted".[5]

Moreover, out of an abundance of caution, the trial judge not only afforded petitioners an opportunity to object to the introduction of any evidence on the ground of possible "taint", but, after the Government had rested, also asked petitioners to make a *post mortem* examination of the record (of which daily copy had been furnished) in order to call to his attention any trial evidence which even suggested that it might have been derived from illegally obtained evidence. (R. 2081.) Defense counsel first replied by referring to the documents and testimony of certain vendors, and then stated his understanding that he was not permitted to interrupt the trial by calling as witnesses and cross-examining those responsible for presentation of the Government's case. (R. 2081–2082.) The court immediately corrected defense counsel's misunderstanding by stating (R. 2082):

> Mr. Stryker, reluctant as I would be to break in on the trial, I would do so if I saw any basis for investigation.

The prosecution then proceeded positively to show that the documents and testimony of the vendors, to which defense counsel had referred, had stemmed

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[5] Petitioners also argue (Br. 22–24) that the District Court erred in not requiring the Government to assume the burden of proving that its evidence was "untainted". Actually, however, none of the Government's evidence having been specifically challenged as "tainted", no issue on this collateral matter was raised, and accordingly no question of burden of proof was presented.

from a proper source. (R. 2082–2083.)[6] Thereafter, the court again invited defense counsel to show anything additional, any "concrete matters." (R. 2087.) Defense counsel responded (R. 2087–2088):

> Well, then, I say that I have nothing further to add on that point other than what I have said, and I understand your Honor denies my motion to dismiss on that ground.

Thus, defense counsel, as he had previously done with respect to the documents and testimony of the vendors (R. 2081–2082), in effect admitted that he saw no indication of the improper use of evidence at the trial.

Finally, the able trial judge, who had been alerted to the problem from the start, and who realized that he had a duty to prevent the use of any "tainted" evidence at the trial, concluded:

> I find nothing in the record of this trial which suggests any use of illegal clues. * * * [R. 2085.]
>
> * * * * *
>
> This question as to the improper use of records, I have watched this case and was alerted to that by you [Mr. Stryker] before I even picked a jury, and as each thread of evidence has gone in I have had sharply in mind the claim you made. I have not seen any evidence which came into this case that struck me as possible evidence that could have been developed through any improper use of the grand jury. [R. 2745.]

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[6] The closeness with which the trial judge was following the source of each bit of evidence or the lead to it was demonstrated by the fact that he volunteered how the Government had found out who the vendors were when defense counsel raised the question. (R. 2082.)

III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT AGAINST LIVORSI

Petitioner Livorsi contends (Br. 37–59) that the evidence was not sufficient to support the verdict with respect to any of the counts of which he was convicted. The contention is without merit. The counts in question are (*a*) Count 6, which charged Livorsi and Roth with wilfully attempting to evade a large part of Livorsi's 1946 individual income tax by filing a false and fraudulent tax return understating his income for that year; (*b*) Count 9, which charged Giglio, Livorsi, Lawn and Roth with wilfully attempting to evade *payment* of a large part of the taxes due and owing by American Brands Corporation for the year 1946 in that they "did misappropriate, convert, and divert" corporate assets "to their own use and benefit"; and (*c*) Count 10, the conspiracy count. (R. 14, 15–21.)[7]

[7] Livorsi also urges (Br. 47–51), in effect, the insufficiency of the evidence to support his conviction on Count 8, which charged that Livorsi wilfully attempted to evade *payment* of a large part of the $236,003.65, reported as income tax liability on his 1946 return, by concealing his assets. He contends that the trial court lacked jurisdiction of this count because the sale of Livorsi's home and the conversion of the $64,000-odd proceeds into $100 bills which Livorsi pocketed a few days after his income tax return was filed (Gov. Br. No. 9, p. 20), took place outside of the Southern District of New York, and that there were no other overt acts proved.

We think there was evidence of overt acts within the Southern District of New York, which, taken together with proof of overt acts committed elsewhere, was sufficient to support the verdict on Count 8. In particular, the filing of Livorsi's return in the Southern District of New York six months late and the

(*a*) Livorsi argues (Br. 37–47) that in withdrawing from the jury's consideration the issue of the truth or falsity of the income reported from Eatsum on Livorsi's individual return (Gov. Br. No. 9, p. 18, fn. 4), the trial court submitted Count 6 to the jury without evidence of a deficiency in tax. Count 6 charged that Livorsi (and Roth) wilfully attempted to evade a large part of Livorsi's 1946 individual income tax by filing a false and fraudulent tax return understating his income. The Government agrees that, on the facts of this case, Livorsi's conviction on this count cannot stand without proof of a tax deficiency. We contend that there was ample proof on this issue.

The Government adduced evidence tending to show a substantial understatement of Livorsi's 1946 income from the Eatsum partnership; from the sale of corn syrup after Lubben left the Eatsum partnership; and

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day before the closing on the New Jersey sale is enough for the jury to conclude that the late filing was a step in the concealment of the funds. The fact that the return was also false and fraudulent, and thus an independent offense (R. 14, Br. 48), does not protect Livorsi from prosecution for concealment of assets by late filing, among other things. Livorsi's withdrawal of over $50,000 from the corporations during the period January to September 1947 when the late returns were filed was additional overt conduct in the Southern District of New York (R. 1916–1917, 1921–1922; Gov. Br. No. 9, pp. 17, 19 and fn. 6), conduct which the jury could find was part of the concealment scheme.

Even if petitioner's venue argument were valid and not waived by lack of objection at the trial, the five-year prison sentence imposed would still be supported by the five-year concurrent sentence imposed with respect to Count 6. (R. 2740–2741.) *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642.

from the Tavern partnership. (Gov. Br. No. 9, pp. 9–10, 12, 16–17.) The major portiton of the alleged understatement with respect to Eatsum resulted from a reallocation of the partners' distributive shares of income. (R. 1851–1857.) The propriety of this reallocation was challenged by the defense on grounds not material here.[8] (R. 1981–2018, 2444–2498.) On the basis of extensive argument, most of it without the presence of the jury (R. 2468–2483, 2488–2498), the trial judge stated that while he was of the opinion that the Government's theory on the issue was correct, he "was impressed, frankly, by what Mr. Stryker said, that it may be a question for the Tax Court and not a criminal trial * * *" (R. 2723–2724). Accordingly, in a supplemental instruction delivered before the jury retired, the court, "in an abundance of caution" (R. 2725), charged as follows (R. 2730–2731):

> Now, I spoke to you about simplifying the picture on Eatsum as to count 1 and counts 5 and 6, and I told you that in considering counts 5 and 6, where it was claimed that part of the income unreported by the defendants Giglio

[8] The gist of the defense contention was that the distributive shares of Eatsum partnership income attributable to the partners for income tax purposes had to be determined by reference to the original partnership agreement, without regard to the dissolution agreement entered into on March 9, 1946. (R. 300–304, 399–400, 1981–2018, 2444–2498.) See Section 182 of the Internal Revenue Code of 1939. Compare *Bell* v. *Commissioner*, 219 F. 2d 442 (C. A. 5) and *Commissioner* v. *Goldberger's Estate*, 213 F. 2d 78 (C. A. 3) with *Cleveland* v. *United States*, 134 F. Supp. 363 (D. Mass.). See also *Pomeroy* v. *Helvering*, 68 F. 2d 411, 412 (C. A. D. C.), certiorari denied, 292 U. S. 635.

and Livorsi, (defendant Giglio in count 5, defendant Livorsi in count 6) was the income from Eatsum. To simplify that, disregard any income they may have received from Eatsum in consideration of those counts, just consider them in respect to Tavern and the cars of corn syrup which were sold by Lubben after the Eatsum partnership, after he had stopped operating as part of the Eatsum partnership.

I hope I have made that clear.

As to Eatsum, you remember there were originally two questions, whether the income from corn syrup was reported or not, the corn syrup transactions, $140,000, and whether the distributive shares were properly stated, and I said that because of the complication of law as to distributive shares we would forget that, and so that when you get to counts 5 and 6, where it was claimed that the income received from Eatsum wasn't fully reported by the defendant Giglio and by the defendant Livorsi, in connection with their individual returns, I say because of that distributive share difficulty, don't consider Eatsum at all, their income from Eatsum at all in connection with counts 5 and 6.

Petitioner Livorsi now construes this charge (Pr. 43), in effect, as telling the jury that in computing his reported income the jury was instructed to give him full credit for the $101,123.88 of income from Eatsum reported on the return, but must eliminate from its calculation of his true income both the reported and the unreported income from that source. In short, Livorsi's contention is that the jury was given

the equivalent of an instruction to credit him with an *overstatement* on his return of the $101,123.88, and to assume that *none* of Eatsum's profits were attributable to him. No such interpretation of the instruction was suggested at the trial, or in the motion for new trial. (R. 2731–2732, 2748–2754.)

We believe that, when viewed in its setting at the trial, the instruction told the jury, as the Court of Appeals concluded, "to disregard alleged *understatement* of income from Eatsum in considering the counts charging the falsification of individual returns." (R. 2971, emphasis supplied.) Count 6 charged Livorsi with wilful attempted evasion of the tax by filing a false and fraudulent tax return understating his income. (R. 14.) As we have said, the Government adduced evidence tending to show Livorsi's understatement of income from Eatsum, his understatement of income from Tavern ($40,436.22), his unreported income from the five cars of corn syrup sold after Lubben left the Eatsum partnership ($20,780.33). (*Supra*, p. 37–38; R. 2939, 2942, 2944.) This count of the indictment and the evidence introduced to prove it all related to, and spoke in terms of, *understatement* of income, and *unreported* income. Indeed, even in the supplemental charge now complained of, the court reminded the jury that with respect to this count "it was claimed that part of the income *unreported* by the defendants Giglio and Livorsi" (emphasis supplied) came from Eatsum. (R. 2730–2731.) We submit that the jury, which had listened to testimony for six weeks, understood that they must not consider the al-

leged unreported income from Eatsum in passing upon Count 6, and that the Court of Appeals was correct in affirming the verdict on this count because "there was evidence of understatement of income from sources other than Eatsum * * *." (R. 2971.)[9] We also submit that the only other reasonable interpretation of the instruction is that the jury should ignore all income from Eatsum, both that reported on the return and that claimed by the Government to have been the correct amount. This, of course, would have produced precisely the same result, *i. e.*, leaving the jury free to find a tax deficiency based on the other sources of income.[10]

(*b*) Count 9 alleged that between January 1, 1946, and the date the indictment was filed (1953), Giglio

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[9] This other income, taxable to Livorsi, aggregated $61,216.55, consisting of $40,436.22 from Tavern and $20,780.33 from the sale of the five cars of corn syrup, both of which the court expressly submitted to the jury in the supplemental instruction. (R. 2731, 2939–2942.) These items provided ample support for the jury's verdict that Livorsi had deliberately understated his 1946 income, even without regard to the alleged $77,164.70 of additional income from Eatsum ($127,164.70 minus the $50,000 reported by Livorsi as "Miscellaneous Income"). (R. 2944.)

[10] Petitioners complain (Br. 41–42) that Government Exhibits 150 and 151 (R. 2943, 2944) should have been stricken or revised to accord with the change in the court's instructions. These exhibits comprise the Government's reconstruction of the 1946 income of Giglio and Livorsi, including (since they were introduced before the Eatsum issue was taken out of the case) the alleged unreported income attributable to them from the Eatsum partnership. When the trial judge announced his intention of withdrawing that issue from the jury, defense counsel expressed the fear that the jury might send for these or other related exhibits. (R. 2724.) However, the jury never asked for these exhibits and never saw them after the charge was given. (R. 2732–2735.)

Livorsi, Lawn and Roth wilfully attempted to evade the *payment* of a large part of the taxes of American Brands Corporation for the year 1946, in that "they did misappropriate, convert, and divert assets of the aforementioned corporations[11] to their own use and benefit." (R. 15–16.) There is no merit in the contention (Br. 51–54) that the evidence against Livorsi was not sufficient to support the verdict of guilty on this count.

The tax reported on the consolidated return of American Brands Corporation and the four other corporations was $104,701.35. (R. 2945.) The correct tax liability was $171,098.79. (R. 2945.) The amount of tax which had been paid at the time of the trial was $300. During the year 1946 Giglio and Livorsi each drew salaries of $65,452.96 from the corporations, a total of $130,905.92. (R. 2947.) During the year 1947 Giglio withdrew a net amount of $42,758.34 and Livorsi, a net amount of $57,058.33,[12] an aggregate

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[11] The corporations mentiongd earlier in the indictment (R. 11, 12) were American Brands Corporation, American Brands Wholesale Corporation, American Trucking and Forwarding Corporation, American Sweets Corporation, and American Agar Corporation.

[12] The 1947 figures include all net drawings, and are not necessarily limited to salaries. The disparity between the drawings of Giglio and those of Livorsi appears to be substantially accounted for by the $15,000 check Giglio deposited into the bank account of American Brands Corporation in September, 1947, representing the proceeds of the sale of his stock in the Van Dyk Industrial Corporation. (Gov. Br. No. 9, p. 21.)

It should be noted that these 1947 withdrawals were not mere bookkeeping entries, as Livorsi suggests (Br. 53), because the money disappeared from view (R. 2206).

of $99,816.67. (R. 1916–1917.) In addition, there was testimony by Roth that under Giglio's instructions he drew a check for $2,000 or $2,500 each week, charged it arbitrarily and falsely to expense accounts, and gave Giglio the cash. (R. 1009, 1014, 1071–1072, 1091–1092.) The jury could reasonably infer that Livorsi received half of these amounts, in view of his 50% ownership of the enterprises, his sharing of salary and other drawings with Giglio on a 50–50 basis, the fact that Giglio was clearly accountable to Livorsi for half of the profits, and the evidence that Livorsi kept such a careful eye on the funds that Giglio, when he wanted to withdraw relatively minor amounts from the business without Livorsi's knowledge, was obliged to do so having Roth draw a check charged to Roth and set up on the books a corresponding amount due the companies from Roth. (Gov. Br. No. 9, pp. 12, 13.)

On the issue of whether Livorsi was a party to wilfully attempting to evade payment of the corporation taxes by misappropriating and diverting corporate assets, the jury was plainly entitled to conclude that it was this systematic syphoning off of hundreds of thousands of dollars of corporate cash by Livorsi and Giglio that debilitated the companies to the point where they could pay neither their taxes nor their general creditors. (*Supra*, p. 42; Gov. Br. No. 9, pp. 19, 22.)

(*c*) Equally without merit is the argument (Br. 55–59) that there was not sufficient evidence to show

Livorsi was a party to the conspiracy.[13] After Lubben left the organization early in March 1946, Giglio and Livorsi were 50–50 owners of all the enterprises except American Agar Corporation, in which Lawn had a 25% interest.[14] (R. 1074, 1116, 1187, 1543, 1912–1913, 2946.) Giglio was, of course, accountable to Livorsi for half the profits, and for this reason Livorsi signed unusual or "special" checks, so that both he and Giglio would know what they were for. (R. 1073–1074.) And, as we have said, the fact that Livorsi watched over the disbursement of company funds is further evidenced by the false entries Giglio had to resort to when he wanted to withdraw money from the businesses without Livorsi's knowledge. On those occasions Giglio would instruct Roth to draw a check charged to Roth and carry it on the books as a credit due the companies from Roth. (Gov. Br. No. 9, p. 13; R. 1073–1074.)[15]

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[13] Count 10 alleged that from about July 1, 1945, and continuously thereafter up to the date of the filing of the indictment (July, 1953), Giglio, Livorsi, Lawn, Roth and American Brands Corporation conspired to violate Section 145 (b) of the Internal Revenue Code of 1939, a conspiracy of which each of the substantive crimes in Counts 1 to 9 was a part. (R. 16–21.)

[14] Giglio gave these shares to Lawn, despite Livorsi's objections, in consideration of work done by Lawn on research. (R. 1141–1142.)

It is true (Br. 56) that Livorsi was not an officer of either of the two corporations whose records disclosed the names of their officers. (R. 1915.) Possibly the reason for this was that Livorsi had a criminal record, having been convicted of a narcotics violation, a fact which, of course, was not before the jury. (R. 100, 2740.)

[15] The total of these defalcations was only about $18,000. (R. 1232–1233.)

As we have shown in (*b*), above, Livorsi profited handsomely from the partnerships and corporations here involved. The books and tax returns themselves show that Livorsi received a salary of $65,452.96 from the corporations in 1946, and net drawings of $57,058.33 in 1947, for a grand total of $122,511.29 in less than two years, an amount slightly higher than Giglio received during the same period. In addition, the jury was entitled to infer that he received his 50% share of the unreported income from the Tavern partnership, $40,436.22, and from the five additional cars of corn syrup sold after Lubben's departure, $20,780.33. (*Supra,* pp. 37–38, 41, fn. 9; R. 2939, 2942, 2944.) Finally, the jury was plainly entitled to infer that Giglio was obliged to, and did, turn over to Livorsi his 50% share of the proceeds of the weekly checks for $2,000 or $2,500 each, which Roth falsely charged to expense accounts at Giglio's direction. (*Supra,* p. 43.) In short, Livorsi profited to the extent of some two hundred thousand dollars from the conspiracy in less than two years, of which no more than $8,736 was used to pay the income taxes of himself and the corporations.[16] (R. 2947.)

The events of September 1947 contain the most striking evidence of concerted action directly involving Livorsi, and clearly supporting the conclusion that he was a party to the conspiracy. It will be recalled that the 1946 individual income tax returns of Livorsi and Giglio were filed belatedly on or about September

[16] No income tax was withheld on Livorsi's salary or other drawings, a fact of which he was certainly aware. (R. 1183, 1922–1923.)

15, 1947, at the same time that the returns of their partnerships and corporations were filed, some of them more than one year after the due-date. (Gov. Br. No. 9, pp. 16–18; *supra*, p. 36, fn. 7.). On almost the very day that these returns were filed, Livorsi, like Giglio, sold his home. After satisfaction of the mortgage, Livorsi received a check on September 19, 1947, in the amount of $64,335.49. He cashed this check at the bank six days later, received at least $50,000 of the proceeds in $100 bills and the balance in bills of unspecified denomination, pocketed the cash, and departed. (Gov. Br. No. 9, p. 20; *supra*, p. 36, fn. 7.)[17]

We submit that the evidence of Livorsi's knowing participation in the conspiracy, like the evidence tending to show his guilt of the other offenses charged, was ample to support the jury's verdict of guilty.

IV

PETITIONERS' REQUEST FOR FURTHER DOCUMENTS FOR USE IN IMPEACHING ONE WITNESS WAS NOT PRESERVED ON APPEAL NOR RAISED IN THE PETITION FOR CERTIORARI. THERE WAS NO PLAIN ERROR.

Petitioners[18] seek to raise one issue which was not raised on appeal nor mentioned in the petition for

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[17] At about the same time Livorsi also sold certain personal property for $3,950, receiving a separate check for that amount. (R. 2058, 2060.) It is interesting to note that the cash realized by Livorsi from these two transactions alone is triple the total amount realized upon the sale of the corporate assets in the receivership which commenced two and one-half months later. (Gov. Br. No. 9, pp. 20; 22.)

[18] Giglio and Livorsi. Lawn does not raise the point in No. 9, this Term.

certiorari. At this date they seek to establish that in the light of the Court's decision in *Jencks* v. *United States*, 353 U. S. 657, the trial judge's failure to grant their blanket request for copies of all statements made by the witness Lubben to government agents was such gross and plain error that their conviction after a six weeks' trial must be set aside and a new trial ordered. (Br. 60–65). The question, as now raised by petitioners, is framed as follows (Br. 4):

> 4. Did the district court err in refusing to turn over to the defendants, for inspection and use in cross-examination, statements and reports made to Treasury agents by David Lubben, one of the government's principal witnesses, as well as the filed copies of his 1946 personal and corporate income tax returns and his grand jury testimony?

We believe that the point was abandoned below and is not properly before the Court, that petitioners have no right to many of the documents lumped into their broad request, that the ruling was based primarily on the ground of avoiding excessive cross-examination of one witness, and that under the facts there was clearly no plain or prejudicial error.

A. THE QUESTION IS NOT PROPERLY BEFORE THE COURT.

The Rules of this Court, Rule 23 (1) (c), provide:

> * * * Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

The wisdom of the rule and the desirability of adhering to it in the absence of unusual showing is well illustrated by this case.

The record suggests conscious abandonment of the point. At petitioners' request, the documents they sought were sealed as part of the record. (R. 908, 1064.) Several days before the Government rested, defense counsel asked for a statement from the prosecutor describing the documents sealed. The judge replied, "Well, that can be completed at the end of the trial." (R. 1421.) No further mention of the matter was made by petitioners in any court until two and one-half years later, in August 1957, when they filed their brief on the merits in this Court. One of the thirty grounds on which petitioners moved for a new trial was limiting the cross-examination of David Lubben in four particulars, but no mention was made of the denial of the prior statements of Lubben to Government agents. (R. 2749.) [19]

That petitioners did not have the *Jencks* decision before them is hardly justification for reviewing points which they themselves did not consider important and upon which they did not insist. Petitioners were in the Second Circuit which had the most well-established rule of any circuit as to the accessibility to a defendant of prior statements of Government witnesses. See *United States* v. *Lebron*, 222 F. 2d 531, and cases cited at 537.

The ruling now sought to be reviewed was not assigned as error on the appeal below, and this Court

[19] Alleged error No. 7 (R. 2749), the judge's quashing of the all-encompassing subpoenas "for information in the Government's possession relating to David Lubben" was not directed at the ruling at R. 908 to which petitioners now object (Br. 64).

has held that "only in exceptional cases" will it review questions not pressed below. *Duignan* v. *United States*, 274 U. S. 195, 200; *Husty* v. *United States*, 282 U. S. 694, 701–702. There appears to be no exceptional circumstance here which would excuse petitioners' failure to seek a review below of the trial court's ruling denying their application for production and inspection. Compare *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 412.

B. PETITIONERS CLEARLY HAVE NO RIGHT TO MUCH OF WHAT IS COVERED BY THEIR BROAD REQUEST

It seems clear that petitioners have no color of right to many of the documents they demanded. They requested income tax returns to impeach Lubben—but not as prior inconsistent statements. Defense counsel requested them on the theory that he would try to prove the returns erroneous and that he would thus attack the veracity and credibility of the witness. (R. 710–711, 716–717.) The court properly found that such a procedure was not permissible as a matter of impeachment and stated that he did not want to "go ahead and try a tax case now." (R. 716, 717.)[20] There is thus no need of considering the effect of the privilege and statutory protection accorded income tax returns (Section 55 of the Internal Revenue Code of 1939; Income Tax Regulation 118, Section 39.55–1; 1939–2 Cum. Bull. 97–103), or the circumstances in

[20] The court added later (R. 733): "At this point I don't feel that you are entitled to that. I mean, I am certainly not going to get into a situation where we have a matter of comparative fault, comparing Lubben's return with the defendants' here."

which the *Jencks* decision might conceivably be applicable to them.

Similarly, petitioners had no right to Lubben's grand jury testimony which was lumped into their request for government documents. (R. 906.) Again we need not consider the applicability to grand jury minutes of the *Jencks* decision standing alone. Any retrial of petitioners would be governed by the legislation recently enacted by Congress in the wake of the *Jencks* decision (Public Law 85–269, September 2, 1957, 71 Stat. 595), and the legislative history makes clear the Congressional understanding that grand jury minutes are protected.[21] If on a retrial petitioners would not be entitled to the grand jury minutes as to Lubben's testimony, there would be no reason for this Court to reverse on that ground. Any error that might have occurred would be harmless.

The demand of petitioners' counsel was for income tax returns, testimony of Lubben "before the grand jury that found this indictment[22] or found any other

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[21] "The committee rejects, therefore, any interpretations of the *Jencks* decision which would provide for the production of entire investigative files, grand jury testimony, or similar materials." (S. Rep. No. 981, 85th Cong., 1st Sess., p. 3.) "It should be noted that grand jury testimony is protected from disclosure by a Federal Rule of Criminal Procedure, 6 (e), and it is within the discretion of the trial judge to decide when grand jury testimony is to be revealed to the defense after a proper foundation is laid. *Jencks* makes no reference to this rule and such a disclosure was not mentioned directly or indirectly in the opinion." (*Id.*, p. 10.)

[22] Lubben did not testify before the 1953 grand jury, which returned the indictment tried here, but before the earlier grand jury, which returned the indictments dismissed by Judge Goddard (R. 904–905.)

indictment against these defendants", and "any kind of statements that he made to any of the agents". (R. 906.) We submit that the request was far too broad, the demand as to statements was far too general, and that the trial court properly denied it.[23] It was not up to the trial court—nor is it the responsibility of this Court—to redraft petitioners' motion on a narrower and more precise basis so that it might properly have been allowed. The request was not made by inexperienced counsel.

C. THERE WAS NO PLAIN ERROR

In the context of the trial, the denial of further material with which to cross-examine Lubben was a reasonable exercise of the Court's discretion. The ruling, if error at all, was not error affecting the fundamental fairness of the trial or of a character which this Court ought to notice to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings. Cf. *United States* v. *Atkinson*, 297 U. S. 157, 160. Petitioner Lawn does not even make the contention that it was error at all.

Of the score of government witnesses, Lubben was the first of the four principal ones (Lubben, Roth, Bereu, and Present) to take the stand. He was ill, requiring regular medication (R. 458), and was afraid for his

[23] Under the *Jencks* decision it remains essential that the demand be for "specific documents". 353 U. S. at 667. It does not appear that the legislation was intended to modify this. With the exception of one item, defense counsel's demand was not limited as to time nor were "the agents" identified by name or description.

life.[24] A reading of the record conveys the impression that defense counsel was seeking to "break" the witness through rigorous and continued cross-examination as to his credibility. Experienced trial counsel subjected Lubben to vigorous cross-examination day after day for five days. (R. 413–909.) Defense counsel was armed with a mass of prior statements by Lubben relating to his dealings with petitioners, because Lubben had testified publicly about them on a number of occasions. Cross-examination was conducted with respect to Lubben's testimony before the Kefauver Committee[25] in 1950 (R. 414–433, 501–523, 822–826, 840–844, 895–896); his testimony in the civil case of *College Town Candies, Inc.* v. *Betancourt* in 1950 (R. 376, 433–452, 470–473, 881–888, 890–892); and his testimony in the *Weleck* trial (R. 580–601) and in *United States* v. *Shotwell Manufacturing Co.*, 225 F. 2d 394 (C. A. 7), certiorari granted, 352 U. S. 997, No. 1, this Term (R. 460, 547–564, 877–881, 888–890). In addition, the defense made extensive use of the privileged partnership records, being in a position to confront Lubben with carefully selected fragments of such records and then interrogating him about them.[26] (R. 738–759, 765–812, 897–900.)

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[24] "* * * every day people get knocked off, sir.

Q. Are you afraid now?—A. Yes, sir; I am." (R. 664–665.)

[25] See Hearings before the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 81st Cong., 2d Sess., Part 3, pp. 21–50.

[26] After the cross-examination of Lubben had been completed, the trial judge, without the presence of the jury, criticized defense counsel for that tactic. (R. 1048–1049.)

Lubben admitted perjury, black marketing, and paying money to Roth for the ostensible purpose of bribing an agent of the Alcohol Tax Unit. (R. 368, 413–435, 437, 439, 450, 472, 673, 675, 686.) Early during the procedure, the court indicated concern at the repetitive nature of the questioning: "I am not going to take the time in this trial to go over the minutes of some other trial to find out how many words are inaccurate and how many are accurate or how many admissible and how many are not." (R. 450.) He occasionally referred to a particular line of inquiry as "cumbersome" (R. 643) or "cumulative". (R. 730.) Defense counsel himself referred to matters "which we have been over-ad nauseam this morning." (R. 678.) But he kept up the attack (R. 686):

> Q. Are you telling the truth in the same way that you told the truth in the College Town case?—A. I told you, sir, I lied in the College Town Candy Company. I told the attorney I lied. I told my priest I lied. God knows I lied. What more do you want? Blood?

When, after five days of such examination, defense counsel demanded copies of all statements Lubben had made at any time to any government agent, as well as the grand jury minutes and tax reports, for the purpose of establishing that Lubben had made prior inconsistent statements, the court said no. The denial was based primarily on the ground that further such cross-examination would be cumulative and repetitious. The court stated (R. 908):

> I will give you my ruling. I have listened to this witness testify since January 17th, at

> or about this time, and I have heard him cross-examined with respect to his testimony in the Shotwell trial, the Kefauver hearings, I think some New Jersey proceeding, and so forth, and I see no basis for producing any further documents on the basis of what I have heard here, and Mr. Wessel's [the prosecutor's] statement simply supports my conclusion that I would otherwise have come to.[27]

The impeachment of Lubben, to the extent that it could be accomplished by prior inconsistent statements, had already occurred. His past conduct was at that point an open book. For five days he had been kept under cross-examination, regularly admitting that he had lied and perjured himself on prior occasions. For all practical purposes, the function of cross-examination to test credibility had been exhausted prior to the court's ruling denying the application. Nothing further of substance could have been added even if the documents sought contained prior inconsistent statements, for such evidence would have been merely cumulative. We submit that if defense counsel, at this stage, had had the documents in his hand, stated that they contained inconsistencies,

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[27] The prosecutor had urged that the documents were extremely voluminous and that there was an inadequate foundation. (R. 906–907.)

and was about to launch another round of cross-examination on the ill and frightened Lubben, the court might well have called a halt. It would hardly have been error, let alone plain error of a character which this Court ought to notice.

Certainly the *Jencks* decision did not mean to remove the trial court's discretion in limiting excessive cross-examination of a harassed witness, nor turn the conduct of the trial over to defense counsel. Since the record indicates that the ruling was independently based on that ground, the supervening *Jencks* decision in no way turns a discretionary ruling, to which no objection was made on appeal nor in the petition for certiorari, into fundamental error.[28]

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[28] In the light of the fact that any new trial would be governed by Public Law 85-269, September 2, 1957, 71 Stat. 595, enacting into statutory law the holding of the *Jencks* decision, that under that law the court may play a role in determining what portions of statements "relate" to the testimony of the witness, and that the issue here is one of alleged fundamental unfairness rather than error properly preserved on appeal as in *Jencks*, the Court might wish to consider the documents from which defense counsel proposed to further cross-examine Lubben. We call to the Court's attention that they were sealed by the trial court (R. 908, 1065) and are now before this Court as part of the record. (This does not include the income tax returns which the trial court permitted the Government to unseal in view of the fact that Lubben's income tax liability was still under examination. (R. 1422-1423, 1679.))

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

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